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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 185

PENNSYLVANIA-READING SEASHORE LINES,
Petitioner,

vs.

HILDEGARDE CAWMAN, ADMX. ESTATE OF JOHN W. CAWMAN, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALFRED E. DRISCOLL,
Counsel for Petitioner.

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HILDEGARDE CAWMAN, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CAWMAN, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioner, Pennsylvania-Reading Seashore Lines, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit (No. 126) entered on March 27, 1940 (R. 211), reversing a judgment of the United States District Court for the District of New Jersey, entered upon a directed verdict in favor of the petitioner (R. 188).

The opinion of the Circuit Court is reported in 110 F. (2d) 832.

Summary Statement of the Matter Involved.

The action in this case to recover damages for the death of Cawman (Jan. 4, 1935) while in performance of his

duties as brakeman in petitioner's service, was brought by respondent, Hildegarde Cawman, Administratrix of the decedent, in the District Court of the United States for the District of New Jersey, under the *Federal Employers' Liability Act, 1908 (35 Stat. 65, U. S. Code, Title 45, Ch. 2, Sec. 51).* The case was tried before the Honorable John Boyd Avis and a jury and resulted in a directed verdict for the defendant, petitioner here (R. 188).

From such judgment appeal was taken by the respondent (R. 193) to the United States Circuit Court of Appeals for the Third Circuit which, after hearing, reversed the judgment of the District Court and granted a new trial.

The trial court, in directing a verdict in favor of the petitioner, relied upon the opinion of this Court in *Baltimore & Ohio R. R. Co.* v. *Berry,* 286 U. S. 272, Cert. granted 285 U. S. 532, where the factual situation was not distinguishable from the instant case. The Circuit Court, while recognizing the full force and significance of the opinion of this Court in *Baltimore & Ohio R. R. Co.* v. *Berry, supra,* suggests, in its opinion reversing the District Court, that a new argument was presented below which was not presented before this Court in the *Berry* case (R. 215).

In both cases an experienced brakeman was injured in the course of his duties as the result of a fall from a bridge or trestle in the night time while his train was on the same. In neither case was there any light, guard rail or catwalk along the outer edge of the bridge although, in the instant case, in contrast to the *Berry* case, we have a bridge with two tracks and a safe walkway between (R. 204).

Your petitioner recognizes the proper reluctance of this Court to grant petitions for certiorari generally and in later years in Employers' Liability cases where the question is one of sufficiency of proof of negligence, interstate commerce and the like, but it respectfully submits that this petition presents "a case of general applicability" involv-

ing the interpretation of the act, the decisions of this Court and the failure of the court below to follow the same.

In main, your petitioner contends: That the Circuit Court of Appeals, in reversing the judgment of the District Court, decided a Federal question in conflict with the applicable decisions of this Court; that the Circuit Court of Appeals, while recognizing the statutory test of liability under the Federal Employers' Liability Act, has construed it as though it were one providing for liability without fault in conflict with the applicable decisions of this Court; that the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court in this class of cases covering the question of *quantum* of evidence legally required to permit the submission of a case to the jury.

Upon the question raised by petitioner that the District Court was right in directing a verdict in its favor and in relying on the opinion of this Court in *Baltimore & Ohio R. R. Co.* v. *Berry*, 286 U. S. 272, it is necessary, briefly, to review the facts.

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333 (1933);

Atchison, Topeka & S. F. R. Co. v. *Saxon*, 284 U. S. 458 (1932).

Respondent's intestate (hereinafter called Cawman), who was employed by petitioner in interstate commerce as a flagman on a freight train proceeding from New Jersey to Pennsylvania, was injured when he fell while possibly attempting to alight in the night time from a caboose which was standing on a bridge. The bridge in question carried two tracks; one for westbound and one for eastbound trains,

together with a substantial footwalk in the middle. No provision was made for a footwalk on its outer sides (Exh. P-3B, R. 204). Respondent's theory of the case is that Cawman fell to the street below while attempting to leave the caboose because there was no room for a landing or walkway on the outer side of the bridge.

In the instant case, as in the case of *Baltimore & Ohio R. R. Co.* v. *Berry, supra,* Cawman was an experienced brakeman and had been in the employ of the petitioner in that capacity for many years (R. 15). For a number of years Cawman's regular run had been over the line where he was injured (R. 50). He was, moreover, qualified to act as conductor and, in fact, did so act about twice each month (R. 68, 89). The duties of a qualified conductor to operate over the road included knowing the signals, the physical characteristics of the road, the danger points, the obstruction of all bridges or signals or other places where there is danger involved in working over the road (R. 50).

Cawman crossed the bridge, from which he fell, on two occasions each day—once in the morning (R. 52) and once in the late afternoon or early evening (R. 52). When the accident occurred the moon was shining (R. 53) and the night was clear.

Cawman was one of a crew of five men on the train consisting of engine, tender, sixteen freight cars of varying lengths and caboose (R. 28, 29, 58). The train and its crew was operated subject to certain rules promulgated by the petitioner and in force on the night in question and known to the members of the crew. Among these rules the following were particularly applicable:

Rule 99, provided that when a train stopped it was the duty of the rear brakeman to carry with him the necessary warnings and to go back a sufficient distance to safely protect the train (R. 32, 51, 123).

Rule 1410, provided that members of the crew were to "get on or off the side of the car or train away from main track or close clearances when conditions permit" (R. 67).

Rule 1406, provided that members of the crew in "getting off standing equipment were to be sure to have a footing before letting go of the handrail" (R. 52).

Rule 107 provided "in case of doubt or uncertainty the safe course must be taken" (R. 184).

After crossing petitioner's bridge over the Delaware River between New Jersey and Pennsylvania, the train on which Cawman was riding approached Frankford Junction where the line from New Jersey intersects the main line of the Pennsylvania Railroad running from New York to Philadelphia. In the interval between the Delaware Bridge and the Junction, the railroad tracks cross five or six bridges spanning city streets, the last of these bridges being the one where the accident occurred. As the engineer crossed this latter bridge and proceeded along the tracks, which curved decidedly to the left, the interlocking signal at Frankford Junction was at STOP (R. 59). The engineer testified that, pursuant to the rules of the road, his attention was directed ahead and that as he stopped his freight train he gave no consideration to the location of the caboose at the rear of the train (R. 59), nor could he see where the caboose was (R. 61) in view of the fact that his train curved away from his line of vision.

The conductor, with whom the decedent was riding in the caboose, testified that "when the train stopped, Cawman went out with his red and white lights" (R. 31). The conductor, however, was unable to state where the caboose was with relation to the bridge as he was seated at his desk doing some clerical work (R. 30). Thus there was no one in a position to testify as to exactly where the caboose was

when Cawman left it or whether or not he got off the right side or the left side, or whether he fell and was injured as he was leaving the train or when he was coming back to the train after the engineer had whistled for his return. In any event, it was perfectly apparent that he did not take the safe course and that if he did fall as he was leaving the caboose, he must have let go of the handrail before he had secured a footing or ascertained whether he could safely alight at the point chosen.

Both the engineer and the front brakeman who, without knowing anything about the accident, were seeking to find out why Cawman did not answer the whistled summons to return to the caboose, descended from the lefthand side of the cab of the engine and walked back between the tracks (R. 67, 82), crossing the bridge on the footwalk between the two tracks shown in Exh. P-3b (R. 204). There was testimony to the effect that the train did not stop for the signal at the Junction every night but possibly only two or three times a week (R. 65).

At the close of the whole case petitioner moved for a directed verdict. The District Court granted petitioner's motion (R. 188). Upon appeal, the Circuit Court of Appeals held that while the case at bar very closely resembled that of *Baltimore & Ohio R. R. Co.* v. *Berry, supra*, and that, following the latter decision, it was not negligence for the petitioner to stop its train with the caboose on the trestle, it was, nonetheless, for the jury to determine whether or not the failure of the petitioner to maintain a light, guard rail or catwalk along the outer side of the bridge constituted a breach of the obligation imposed by the Employers' Liability Act.

Reasons Relied On for the Allowance of the Writ.

1. The Circuit Court of Appeals, in reversing the judgment of the District Court in favor of petitioner, has de-

cided a Federal question in conflict with the applicable decisions of this Court.

Baltimore & Ohio R. R. Co. v. *Berry*, 286 U. S. 272;
Delaware, Lackawanna & Western R. Co. v. *Koske*, 279 U. S. 7, 10;
Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 165;
Missouri & Pacific R. Co. v. *Aeby*, 275 U. S. 426, 429;
Atlantic Coast Line v. *Davis*, 279 U. S. 34.

2. The Circuit Court of Appeals, in reversing the judgment entered by the District Court on a direction of verdict in favor of the petitioner, has decided a Federal question in a way in conflict with the applicable decisions of this Court in this class of case when an experienced employe assumes the risk of injury.

Delaware, Lackawanna & Western R. Co. v. *Koske*, 279 U. S. 7, 11;
Chesapeake & Ohio Rwy. Co. v. *Kuhn*, 284 U. S. 44;
Missouri & Pacific R. Co. v. *Aeby*, 275 U. S. 426, 430;
Seaboard Air Line v. *Horton*, 233 U. S. 492, 502.

3. The Circuit Court of Appeals, in reversing the judgment of the District Court in favor of petitioner and remanding the case for a new trial, has decided a Federal question in conflict with the applicable decisions of this Court in those cases on the question of the quantum of evidence legally required to permit the submission of a case to the jury.

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333;
Atchison, T. & S. F. R. Co. v. *Saxon*, 284 U. S. 458;
Gunning v. *Cooley*, 218 U. S. 90;
Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 165;
Gulf, M. & N. R. Co. v. *Wells*, 275 U. S. 455, 457;
C. M. & St. P. R. Co. v. *Coogan*, 271 U. S. 472, 474.

4. The Circuit Court of Appeals erred in reversing the judgment of the District Court directing a verdict in favor of the petitioner, on the ground that the respondent's negligence was the proximate and sole cause of his injury and that the judgment of the court below should have been affirmed, has decided a Federal question in conflict with the applicable decisions of this Court in this class of cases where an experienced employe's injury is caused by his sole negligence.

Baltimore & Ohio Railroad Co. v. *Berry*, 286 U. S. 272;
Atlantic Coast Line R. Co. v. *Driggens*, 279 U. S. 787;
Great Northern Rwy. Co. v. *Wiles*, 240 U. S. 444;
Kansas City S. R. Co. v. *Jones*, 276 U. S. 303.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 185

PENNSYLVANIA-READING SEASHORE LINES,
Petitioner,

vs.

HILDEGARDE CAWMAN, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CAWMAN, DECEASED,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

There was no opinion by the District Judge, although his reasons for directing a verdict are set forth in the record on page 189 *et seq.*

The opinion of the Circuit Court of Appeals (R. 211) is reported in 110 F. (2d) 832.

II.

Jurisdiction.

1. The statutory provision believed to sustain the jurisdiction of this Court is Judical Code, Sec. 240 (a) as amended by the act of Feb. 13, 1925, 43 Stat. 938 (U. S. Code, Title 28, Sec. 347 (a)).

2. The order of the Circuit Court of Appeals, review of which is sought, was entered on March 27, 1940 (R. 215).

Although the order of the Circuit Court of Appeals is not a final judgment, Sec. 240 (a) of the Judicial Code, as amended, clearly confers discretionary jurisdiction upon this Court to bring up a case of this character from a Circuit Court of Appeals by certiorari and sub-paragraph (b) of Paragraph 5 of Rule 38 of this Court clearly recognizes such right. Certiorari was allowed by this Court after a judgment was reversed and a new trial ordered in the Circuit Court of Appeals in the cases of *The Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, and *Dilk* v. *St. Louis & San. Fran. R. R. Co.*, 220 U. S. 580. Other cases believed to sustain the jurisdiction of this Court are cited in the accompanying petition.

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari and, in the interest of brevity, are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals erred:

1. In holding that the judgment of the District Court entered on the directed verdict for the defendant should be reversed, such reversal being in conflict with the applicable decisions of this Court;

2. In that while recognizing the statutory test of liability under the Federal Employers' Liability Act, it has construed the act as though it were one providing for liability without fault in conflict with the applicable decisions of this Court.

Summary of Argument.

The points of the argument follow the reasons relied upon for the allowance of the writ. We will confine ourselves to these reasons.

ARGUMENT.

(Italics and boldface type ours unless otherwise noted.)

I.

The Circuit Court of Appeals, in reversing the judgment of the District Court in favor of petitioner, decided a Federal question in conflict with the applicable decisions of this Court.

A. Baltimore & Ohio Railroad Co. v. Berry, 286 U. S. 272.

It is almost unique to find two cases whose factual backgrounds are so nearly identical. In the instant case, as in the *Berry* case, in which the opinion of this Court was written by Mr. Justice Stone, the injured party was an experienced railway brakeman. In both cases we have a brakeman leaving his caboose while it was standing on a trestle in the night time and apparently stepping off into space as a result of which injuries were sustained. In the *Berry* case the brakeman leaves the caboose on orders from the conductor while in the instant case he is complying with a rule of the road to protect the rear end of the train.

In neither case was the outer edge of the bridge or trestle protected by a light, guard rail or catwalk although, in the instant case, had Cawman descended from the caboose between the tracks he would have found a walkway.

This Court, in its opinion in the cited case, referring to the Missouri Supreme Court (286 U. S. 272, 274) said:

> "It held rightly that there was no evidence that the petitioner was negligent in stopping the train where it did but as it concluded that the petitioner negligently directed or permitted respondent to alight at that point, it upheld the verdict as necessarily involving a finding of such negligence on the part of the conductor."

In reversing the court below upon the ground that it was error to permit the case to go to a jury, we find this Court observing (page 274):

> "There was no evidence that either the conductor or respondent knew that the caboose had stopped on the trestle and, as they were together in the cupola of the caboose when the train stopped, their opportunity for knowledge, as each knew, was the same. Hence, there is no room for inference that the conductor was under a duty to warn of danger known to him and not to the respondent, or that respondent relied or had reason to rely on the conductor to give such warning. Nor was the request to alight a command to do so regardless of any danger reasonably discoverable by respondent. *The conductor did not ask respondent to alight from the caboose rather than from one of the forward cars standing clear of the trestle, where it was safe, or to omit the precautions which a reasonable man would take to ascertain, by inspection, whether he could safely alight at the point chosen.* There was no evidence that the respondent could not have discovered the danger by use of his lantern or by other reasonable precautions, or that he in fact made any effort to ascertain whether the place was one where he could safely alight."

And again on page 275, we find this Court, in its opinion, repeating:

> "There was no breach of duty on the part of the conductor in asking the respondent, in the performance of his duty, to alight or in failing to inspect the place

where he alighted or to warn him of the danger. *If negligence caused the injury, it was exclusively that of the respondent.* Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act."

The Circuit Court of Appeals, in its opinion (R. 214), while conceding that, under the authority of the *Berry* case, the stopping of the train so that the caboose was on a trestle, the outer edge of which provided no room for alighting and from which the brakeman attempted to alight either pursuant to order given by the conductor, as in the *Berry* case, or under the rules, as in the instant case, offered no evidence of negligence, nevertheless reversed on the following grounds:

"The trestle from which the plaintiff's intestate fell was that and nothing more. There was no light, guard rail, or catwalk for the protection of those whose duties might require their physical presence on the non-existent flooring. We think this omission may constitute a breach of the conceded obligation to provide a safe place to work" (R. 214).

* * * * * * *

"The failure or compliance in this aspect was not presented to the United States Supreme Court in Baltimore & O. R. Co. *v.* Berry, 286 U. S. 272. We believe it properly for the consideration of a jury and not of a court" (R. 215).

The record in the *Berry* case and the opinion of this Court, clearly demonstrate that this Court had before it for consideration, the physical condition of the trestle in question which was "so narrow as to afford no foothold to one getting off the train at that point".

In both cases the question of negligence necessarily turned upon the character of the place where the brakeman was directed to alight. In the *Berry* case neither side of the

trestle provided the brakeman with a safe place to alight. In the instant case, a safe walkway was provided between the tracks and it would seem that under these circumstances the matter is a *fortiori* in the case at bar. The Circuit Court of Appeals below has attempted to create a distinction without a difference. The decision of the Circuit Court creates uncertainty and confusion in the application of the Federal law. While the opinion below indicates a perhaps justifiable dissatisfaction with the present act, the correction of this unfortunate state of affairs must necessarily be left to the legislature. In the meantime, it is the duty of the Circuit Court of Appeals to follow the decisions of this Court.

B. UNDER THE APPLICABLE DECISIONS OF THIS COURT, PETITIONER WAS NOT REQUIRED TO CONSTRUCT OR MAINTAIN ITS BRIDGE ACCORDING TO ANY PARTICULAR STANDARD.

The Circuit Court of Appeals, in suggesting that the failure of the petitioner to have a "light, guard rail or catwalk" was apparently, in every instance, "properly for the consideration of a jury and not of the court" (R. 215), is clearly in conflict with the applicable decisions of this Court on this question.

In the case of *Delaware, Lackawanna & Western R. R. Co.* v. *Koske*, 279 U. S. 7, 11, in which this Court reversed the trial court for its failure to direct a verdict, there was a somewhat analogous set of facts. Plaintiff sued under the Federal Employers' Liability Act in the New Jersey State Court for damages for injuries sustained by him when, at four o'clock of a June morning, on alighting from an engine in the course of his employment, he stepped into a ditch and was injured. Defendant moved for a directed verdict on the ground that there was no evidence of negli-

gence and that it conclusively appeared that complainant assumed the risk of accident and injuries complained of. The opinion states, at page 11:

> "Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care, having regard to the circumstances. Patton *v.* Texas & P. R. R. Co., 107 U. S. 658, 664; 45 Law Ed. 361, 364; 21 Sup. Ct. Rep. 275. There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involved less of danger to switchmen and others employed therein. *Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage systems therein to the uncertain and varied judgment of juries.* Toledo, St. L. and W. R. Co. *v.* Allen, 276 U. S. 165, 170; 72 L. ed. 513, 516; 48 Sup. Ct. Rep. 215."

In the case of *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, the plaintiff brought suit under the Act in the courts of Missouri for injuries sustained by him while checking cars in a railroad yard as a result of being crushed between two cars on different tracks where the evidence disclosed these tracks were only two feet nine inches apart without considering grab irons which projected further into this space. Cars were being shifted without lights at the time. The trial court permitted the case to go to the jury. This Court, in its opinion reversing the lower court and

holding that it was error to have submitted the question to the jury, stated (page 170):

> "*The rule of law* which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work *did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards.* Baltimore & O. R. Co. *v.* Groeger, 266 U. S. 521, 529, 69 L. Ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. Tuttle *v.* Detroit, G. H. & M. R. Co., 122 U. S. 189, 194, 30 L. Ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; Randall *v.* Baltimore & O. R. Co., 109 U. S. 478, 482, 27 L. Ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Washington & G. R. Co. *v.* McDade, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044."

Likewise, in the case of *Missouri P. R. Co.* v. *Aeby*, 275 U. S. 426, 430, 72 L. Ed. 351, 354, this Court, in commenting on a construction of a railroad platform containing a depression into which an employee had stepped and fallen, said:

> "The petitioner (railroad) was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. Baltimore & O. R. Co. *v.* Groeger, 266 U. S. 521, 529, 69 L. Ed. 419, 424."

It is perfectly apparent from a study of the opinions rendered by this Court over a wide period of time, that it is now well established that our highest court will not limit either the freedom of choice which the railroad has in the construction of its bridges nor permit a jury question to be raised as to the standard of such construction.

Delaware, L. & W. R. Co. v. *Koske, supra.*

The broad language used by the Circuit Court of Appeals below is in clear conflict with the decisions previously cited.

C. Respondent's intestate voluntarily assumed the risk of his employment, including the risk which allegedly resulted in his death.

The Circuit Court of Appeals, in reversing the judgment entered by the District Court on a direction of verdict in favor of the petitioner, entirely ignored, in its opinion, petitioner's defense of assumption of risk.

Except as specified in the Federal Employers' Liability Act, an employee assumes the risks of his employment and when obvious or fully known and appreciated by him, the extraordinary ones and those due to the negligence of his employer and fellow employees.

Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 160;
Seaboard Airline R. Co. v. *Horton*, 233 U. S. 492, 502;
Missouri & Pacific R. Co. v. *Aeby*, 275 U. S. 426, 430;
Delaware, L. & W. R. Co. v. *Koske*, 279 U. S. 7, 11;
Patton v. *Texas & Pacific Rwy. Co.*, 179 U. S. 658, 663.

This question was also present in the case of *Baltimore & Ohio R. Co.* v. *Berry, supra*, where this court reversed the lower court and held it was error to have permitted the case to go to the jury.

In the instant case it cannot be said that the danger which confronted Cawman as he performed his duty on the night in question was anything other than a normal incident to his employment. The undisputed testimony was to the effect that he was an experienced railroad man; that he had been over this run as far back as 1917 and that since 1932 or 1933 he had been going over it on two occasions daily. He, therefore, was or should have been thoroughly familiar with the fact that there were a number of bridges in this locality and that this particular bridge was in the

immediate locality where this train was frequently forced to stop because of the signal. Under these circumstances, if this was an extraordinary risk, then he assumed it together with those risks due to negligence of his employer and fellow employees.

Seaboard Airline R. Co. v. *Horton*, 233 U. S. 492, 501.
Jacobs v. *Southern Railway Co.*, 241 U. S. 229.

In addition, it must be remembered that he had with him the necessary lights as he left the caboose. As this Court said in the case of *Baltimore & O. R. Co.* v. *Berry, supra* (page 275):

> "The conductor could have no knowledge of such danger, nor was he in a position to gain knowledge, superior to that of other trainmen, *whose duty it was to use reasonable care to ascertain, each for himself, whether, in doing his work, he was exposing himself to peril.*"

Nothing appears in the case to suggest that the bridge in question was in anywise contrary to good railroad practice.

Sec. 4 of the Federal Employers' Liability Act, provides:

> "Such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute, enacted for the safety of employes, contributed to the injury or death of such employe."

This Court has held that in so eliminating the defense of assumption of risk in the cases indicated, Congress plainly evidenced its intent that in all other cases such assumption shall have its former effect as a complete bar to the action.

Seaboard Airline R. Co. v. *Horton*, 233 U. S. 492, 502.

There is no suggestion here that any statute enacted for respondent's safety has been violated.

Delaware, L. & W. R. Co. v. *Koske, supra,* bears striking analogy to the instant case. In that case also, the employe received injuries while alighting from a train. The negligence charged in the *Koske* case was the "permitting an open, uncovered, and unlighted and dangerous hole to exist between certain parts of said tracks." This Court held (page 12), that the plaintiff had assumed the risk.

D. THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE PETITIONER.

The Circuit Court of Appeals, in reversing the judgment of the District Court in favor of petitioner and remanding the case for a new trial, has rendered an opinion in conflict with the decisions of this Court on the question of the quantum of evidence legally required to permit a submission of a case to the jury.

Pennsylvania Railroad Co. v. *Chamberlain,* 288 U. S. 333;
Atchison, T. & S. F. R. Co. v. *Saxon,* 284 U. S. 458;
Gulf M. & N. R. Co. v. *Wells,* 275 U. S. 455, 457.

The authorities are unanimous in their holdings that negligence on the part of the employer may not be inferred under the Employers' Liability Act from the mere existence of danger to the employee or from the fact the plaintiff was injured while in the employment of the railroad.

Toledo, St. L. & W. R. Co. v. *Allen,* 276 U. S. 165, 169;
Missouri P. R. Co. v. *Aeby,* 275 U. S. 426, 430;
Atchison, T. & S. F. R. Co. v. *Saxon,* 284 U. S. 458.

No employment is without its dangers, least of all the type of employment engaged in by the respondent's intestate.

In the instant case, under the holdings of this Court in the *Berry* case, there was no evidence of negligence which would warrant the reversal of the judgment of the District

Court based upon a directed verdict in favor of petitioner.

This Court has held that the stopping of the caboose on the trestle was not, in itself, evidence of negligence. This Court has held that the mere happening of an accident in the course of employment by a railroad is not, in itself, evidence of negligence. This Court has refused to construe the act as imposing any particular standard for railroad construction or to leave such engineering questions to "the uncertain and varying opinion of juries". There was nothing to submit to the jury and hence no warrant for the reversal of the judgment of the District Court.

E. If negligence caused the death of respondent's intestate, it was exclusively that of respondent's intestate.

That was the decision of this Court in the *Berry* case.

It is respectfully submitted that if there is evidence of negligence in this case, it is exclusively that of Cawman.

As Mr. Justice Holmes said, in delivering the opinion of this Court in the case of *Davis* v. *Kennedy,* 266 U. S. 147, 148, 69 L. Ed. 212, 216:

> "It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more. Frese *v.* Chicago, B. & Q. R. Co., 263 U. S. 1, 3, 68 L. Ed. 131, 132, 44 Sup. Ct. Rep. 1."

Cawman was an experienced brakeman. He had his lantern. He had been over the bridge in question many times and was undoubtedly familiar with its width and the dangers involved. He apparently stepped from the caboose without the exercise of any kind of care or caution. Had he taken the precaution which a reasonable man would have taken to ascertain by inspection whether he could safely alight at the point chosen, there would have been

no accident. His negligence was the proximate and sole cause of his injury and thus the judgment of the District Court should have been affirmed and the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court in this class of case where an experienced employe's injury is caused by his sole negligence.

Atlantic Coast Line R. Co. v. *Driggens*, 279 U. S. 787;
Great Northern Rwy. Co. v. *Wiles*, 240 U. S. 444;
Kansas City S. R. Co. v. *Jones*, 276 U. S. 303.

Conclusion.

From the foregoing it appears that the Circuit Court of Appeals for the Third Circuit has rendered a decision of such a nature as to justify the issuance of a writ of certiorari for its review.

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Supreme Court of the United States

October Term, 1940.

No. 185.

PENNSYLVANIA-READING SEASHORE LINES,
Petitioner,

v.

HILDEGARDE CAWMAN, Administratrix of the Estate of JOHN W. CAWMAN, deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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HILDEGARDE CAWMAN, Administratrix of the Estate of JOHN W. CAWMAN, deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Your respondent, Hildegarde Cawman, administratrix of the Estate of John W. Cawman, deceased, respectfully opposes the application of the petitioner for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit (No. 126) entered on March 27, 1940 (R. 211), reversing a judgment of the United States District Court for the District of New Jersey, entered upon a directed verdict in favor of the petitioner (R. 188) upon the following grounds:

1. The judgment sought to be reviewed is not a final one and there are no extraordinary circumstances present in the case which warrant the issuance of the writ of certiorari to the petitioner.

2. The Circuit Court of Appeals in reversing the judgment of the District Court did not decide a Federal question in conflict with the applicable decisions of this Court.

3. It is a factual question for submission to a trial jury whether or not the petitioning carrier provided the respondent's intestate with a safe place to work in accordance with the conceded obligation which it owed to him.

STATEMENT OF THE CASE.

The respondent's intestate, John W. Cawman, was employed as a freight brakeman by the petitioner. On January 3rd, 1935, while engaged in his regular duties as a rear brakeman or flagman, he was riding in the caboose on the rear end of petitioner's freight train, No. P.P. 802, and traveling from Pavonia, New Jersey, to West Philadelphia, Pennsylvania. After crossing the Delair Bridge from New Jersey, the said train was proceeding westwardly along the tracks of the Pennsylvania Railroad in Philadelphia, Pennsylvania. It stopped at a signal shortly before coming to the Frankford Junction of the said railroad. When it had thus stopped, the caboose in which the respondent's intestate was riding was standing upon an unguarded trestle over Aramingo Street and known as the Aramingo or Memphis Street Bridge. This trestle was wide enough to accommodate two tracks with a footpath in the middle between the two tracks. The outer sides of this trestle

or bridge had no footpath, no handrail or any other guard to protect employees from falling (R. 202 to 205).

When the train in question came to a stop, it thereupon became the decedent's duty, in accordance with the rules of the petitioning carrier, to immediately alight from the caboose and proceed back a sufficient distance from the rear of his train, so that he could properly signal any oncoming trains to stop. The steps of the caboose as it stopped on the trestle, extended beyond the edge of the northerly side of the said trestle. The rules and regulations of the petitioner required the decedent to carry with him, as he alighted from his train, a red signal lantern, a white signal lantern, and several signalling devices known as torpedoes and fusees.

The night in question was very dark and cold. There were no lights at or near the trestle bridge over Aramingo Street to apprise the respondent's intestate, as he alighted from the caboose or prior thereto, that the caboose had stopped on the unprotected and unguarded bridge trestle. In accordance with the rules and regulations of the petitioner, and the approved custom among railroad men, the decedent was required to alight backwards from the caboose holding the grab-iron of the caboose. When the decedent stepped from the caboose, instead of landing on the ground, he stepped into empty space and crashed to the street approximately eighty (80) feet below the trestle, and was fatally injured.

The train on which the decedent was working had stopped at the signal east of Frankford Junction to permit another train, which was ahead of the decedent's train, to cross over from the westbound track to the adjoining eastbound track and then to proceed eastwardly along the track immediately adjacent to where the decedent's train had stopped. The rules and regulations of the railroad ordi-

narily require a rear flagman, when alighting from a train, to alight on the right-hand side thereof. This rule is especially obligatory when there is a train approaching on an adjacent track, which is the fact in this case.

When the "proceed signal" was displayed to the decedent's train, the other members of the crew became aware that the decedent did not respond to the engineer's signal to return. They started to look for him. They found him on the ground eighty (80) feet below the trestle. According to the various witnesses, the decedent's body was located at a distance from four (4) to twenty (20) feet east of the west embankment. He was unconscious. He made no statement at any time. He died the next day in the Frankford Hospital. He left surviving him a widow and a son. The son was not dependent upon him for support, but the widow, however, was.

The respondent endeavored on several occasions during the trial of this cause to introduce evidence that the petitioner had failed to provide the respondent's intestate with a safe place to work. The trial Court refused to admit the testimony (R. 58). The respondent also attempted to show by expert testimony and other testimony the kinds and types of bridges which were used and the ordinary safeguards which were provided by the petitioning railroad and other railroads for bridges of a similar kind in similar situations and places. The trial Court also refused to receive this testimony (R. 70 to 73). The trial record contains voluminous testimony concerning the unsafe construction of the bridge, the lack of guards, lights, etc. In fact, the Circuit Court of Appeals in commenting on this point in its opinion stated that "In the case at bar, there is such mention and in, so to speak, full bodied terms."

The widow, who is the respondent in the present proceeding, states that the decedent turned over his entire

salary to her. His average earnings were approximately Two Thousand Dollars ($2,000.00), a year. She further testified that prior to his death, he had continuously enjoyed good health. The decedent was fifty-one (51) years of age, when he was killed. He was about five (5) feet, eight (8) inches tall and weighed about one hundred and ninety (190) pounds. He had been working for the petitioner for twenty-eight (28) years.

The issue came to trial before the Honorable John Boyd Avis and a jury on November 1, 1938, in the United States District Court for the District of New Jersey, at Camden, New Jersey. Testimony was offered at the trial in behalf of the respondent, and also in behalf of the petitioner. At the conclusion of the respondent's direct testimony, the petitioner moved for a directed verdict, which the trial Judge refused. After both sides had rested, the petitioner again moved for a directed verdict. The Court granted this motion and directed the jury to find a verdict of no cause for action in favor of the petitioner. The respondent thereupon appealed from the judgment that was entered against her by the jury at the direction of the trial Court to the Circuit Court of Appeals for the Third Circuit.

The Circuit Court of Appeals by its decision reversing the trial Court, did not take issue with the ruling of the trial Court with respect to the application of *B. & O. R. R. v. Berry,* 286 U. S. 272. As a matter of fact, the appellate tribunal held that the decision in *B. & O. R. R. v. Berry* had been properly applied by the trial Court, and based its judgment of reversal on the ground that the failure or compliance of the petitioner to provide respondent's intestate with a safe place to work was a question properly for the consideration of the jury and not of the trial Court. It was for this reason alone that a new trial was granted.

QUESTIONS.

The petitioner's questions are not presented by the facts in this case and are therefore moot. If any question is presented under the facts in the case at bar, it is, "Shall your Honorable Court issue a Writ of Certiorari to review an order which is not a final judgment, but merely an order granting a new trial?"

ARGUMENT.

I. The Court will not, except in extraordinary cases, issue a writ of certiorari until final decree.

The respondent respectfully suggests that in the present case the only issues involved are questions of fact and not of law. The law in reference to the obligation of the master to provide a safe place for the servant to work has been definitely settled both by statute and by judicial decision.

Boal v. Electric Storage Battery Co. (98 Federal 2nd 815);

Reading Company v. Geary (47 Federal 2nd 142).

The United States Circuit Court of Appeals for the Third Circuit granted the respondent a new trial on the ground that the case was one for the consideration of the jury, and in its opinion said (R. 214 to 215):

> "The, what by way of contract we may call, passive facts tell another story. The theory of the Berry case is negligence of personnel. There is no mention in

either opinion of failure of material. In the case at bar, there is such mention and in, so to speak, full bodied terms. The trestle from which the plaintiff's intestate fell was that and nothing more. There was no light, guard rail, or catwalk for the protection of those whose duties might require their physical presence on the non-existent flooring. We think (fol. 216) this omission may constitute a breach of the conceded obligation to provide a safe place to work. The cases are collected in 45 U. S. C. A. Sec. 51, note 289, p. 185 (1939 Supp.) p. 49. That obligation assumes as many forms as there are places to work. The citation of authority, except by way of analogy, is not, therefore, profitable. Plaintiff-appellant calls attention to one such analogy, the telltales before low bridges and tunnels. Later cases than those in his brief are Davis v. Crane, 12 F. (2d) 355, 356; Reading Co. v. Geary, 47 F. (2d) 142. There are other pertinent circumstances. See 45 U. S. C. A. Sec. 51, note 305, p. 195 (1939 Supp.), p. 54; note 306, p. 196 (1939 Supp.), p. 54; note 525, p. 291 (1939 Supp.), p. 88. The provision of mechanical safeguards is more simple than the employment of careful employees. Men are more fallible than machines: one lantern or a few boards and a man's life is saved.

"The failure or compliance in this aspect was not presented to the United States Supreme Court in Baltimore & O. R. Co. v. Berry, 286 U. S. 272. We believe it properly for the consideration of a jury and not of a court."

No final decree or judgment has been entered in the present case, and your respondent respectfully urges that the petitioner is not entitled to a writ of certiorari to review

the decision of the United States Circuit Court of Appeals for the Third Circuit, which, in effect, is an interlocutory order in the cause.

In the case of *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, at 258, this Honorable Court in delivering its opinion, said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision * * * and except in extraordinary cases, the writ is not issued until final decree. * * * The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application: * * *."

In the case of *American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*, 148 U. S. 372 at 384, this Honorable Court stated:

> "Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

The decision of the Circuit Court of Appeals for the Third Circuit in the case at bar has the effect of being an interlocutory order in the cause and not a final judgment, and there are not present any extraordinary circumstances which justify this Honorable Court to exercise its sound judicial discretion, so that a writ of certiorari may be allowed the petitioner.

II. The Circuit Court of Appeals in reversing the judgment of the District Court in favor of the petitioner did not decide a Federal question in a way probably in conflict with the applicable decisions of this Court as to call for an exercise of this Court's power of supervision.

The opinion of the Circuit Court of Appeals (110 Fed. 2nd, 832), was in accord with the trial Court's application of the rule as to negligence of personnel as enunciated in the case of *Berry v. B. & O. R. R.* (286 U. S. 272). The opinion of the Circuit Court of Appeals, however, points out the fact that a new trial was granted the respondent, because it was a question of fact for the jury to determine whether or not the respondent's intestate was provided with a safe place to work by the petitioner. In this respect, the Circuit Court of Appeals distinguishes the Berry case from the instant case by pointing out that the theory of the Berry case is negligence of personnel, and further, that the trial Judge in the case at bar erred in not presenting to the jury for its consideration and determination the factual question as to whether or not the petitioner had provided the respondent's intestate with a safe place to work.

The following excerpts from the opinion of the Circuit Court of Appeals indicate the basis on which that tribunal distinguished the present case from the Berry case, *supra* (R. 214).

> "The, what by way of contract we may call, passive facts tell another story. The theory of the Berry case is negligence of personnel. There is no mention in either opinion of failure of material. * * * The failure or compliance in this aspect was not presented to the

United States Supreme Court in Baltimore & O. R. Co. v. Berry, 286 U. S. 272. We believe it properly for the consideration of a jury and not of a court."

The terms and provisions of Rule 38, Sec. 5 (b) of the United States Supreme Court provide that a writ of certiorari is not a matter of right but of sound judicial discretion and will only be granted where there are special and important reasons therefor. Among the reasons indicated in the rule for the allowance of the said writ is the situation where a Circuit Court of Appeals has rendered a decision deciding an important Federal question in a way probably in conflict with the applicable decisions of this Court. The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the applicable decisions of this Court. It is respectfully urged that there are neither special nor important reasons therefore justifying the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals.

III. The petitioner was required to construct or maintain the trestle where the respondent's intestate was killed with reasonable or ordinary care having regard to circumstances.

In regard to the question as to whether or not the petitioner had furnished the respondent's intestate with a safe place to work, the respondent offered testimony at the trial and endeavored to show that the petitioner had not so constructed or maintained its trestle. The respondent further attempted to offer evidence to show that the bridge or trestle was not suitable or appropriate for the purpose for which it was maintained. A further offer of proof was

made to show that there was in use by the petitioner and other carriers means for the protection or maintenance of the said trestle which involved less danger to the men employed at that point. All of these offers were rejected by the trial Court.

IV. The respondent's intestate did not voluntarily assume the risk which resulted in his death.

In regard to this question, it might be stated that the trial Judge in directing a verdict in favor of the petitioner based his decision solely upon the case of *Berry v. B. & O. R. R., supra*, rather than on the question of the voluntary assumption of the risk by the respondent's intestate.

It is well settled that where one is employed, as the respondent's intestate, he assumes only the ordinary risks normally incident to the work in which he is voluntarily engaged. The decedent did not assume other extraordinary risks, nor such risks as may be due to the negligence of the petitioner, unless the risks resulting from such negligence are so well known and obvious to the decedent or are so plainly observable that he may be presumed to know of them.

> "In a clear case, the question of assumption of a risk by an employee is one of law for the Court, but where there is doubt as to the facts or as to the inferences to be drawn from them, it becomes a question for the jury. To preclude a recovery on that ground, it must appear that the employee knew and appreciated, or should have known and appreciated the danger to which he was exposed, and in case of doubt, that is for the jury * * * The burden of proof as to the assumption of risk is upon the defendant, and

where there is any doubt as to the facts or inference to be drawn from them, the question is for the jury." (*Cobia v. Atlantic R. R. Co.*, 125 S. E. 18, at page 21.)

In the case of *Marland v. P. & R. Ry. Co.* (246 Fed. 91), it was held to be a question for the jury to decide whether the railroad gave proper notice to its employees of the existence of an overhead bridge. It likewise is a question of fact for the jury to decide whether respondent's intestate received proper notice, if any, of the existence of the trap that confronted him on the trestle bridge where he was killed.

The rule of assumption of risk has likewise been well stated by Mr. Chief Justice Fuller in the case of *Un. Pac. Ry. Co. v. O'Brien* (161 U. S. 451 at 457), when he stated:

> "The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of its servants the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master himself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track and other structures. * * *"

The petitioner urges that negligence on its part may not be inferred under the employer's liability act from the mere existence of danger to the employee, or from the fact that the respondent's intestate was injured while in the

employment of the railroad. It is the respondent's position that she is entitled to show by competent evidence that the petitioner failed to provide her intestate with a safe place to work and that such proof may be offered by showing that the petitioner failed to use reasonable care in constructing and maintaining the trestle in question.

V. The negligence of the respondent's intestate would not bar recovery.

It has been decided in a long line of cases that the contributory negligence of the respondent's intestate cannot bar recovery for an injury sustained and for which damages are sought under the Federal Employers' Liability Act. Contributory negligence is a factor for a jury to consider in assessing damages against the petitioner. If the jury is satisfied that the employee has been contributorily negligent, the damages awarded should be diminished accordingly. This is a question which can be properly and appropriately controlled by the trial Court in his instructions to the jury. It is not a matter of law to be decided by the trial Court on a motion, nor by this Court on appeal.

CONCLUSION.

In conclusion, your respondent respectfully urges that there is no new, uncertain or complex question of law or practice presented in this case. If a writ of certiorari is granted to the petitioner, a precedent will be established wherein all dissatisfied litigants may apply for such a writ of review after a Circuit Court of Appeals has decided a case adversely to their interest. The matter involved

between the parties hereto is a matter of private right and is important to them only. No question of either public interest or public policy is involved.

Wherefore, your respondent respectfully asks that the prayer of the petitioner for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit be denied.

Respectfully submitted:

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